


**APAAC SUMMER CONFERENCE  
2016 DUI LEGAL UPDATES**

And Reminders

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Governor Doug Ducey

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**Legislative Update**

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**DUI Legislation**

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## Affirmative Defense - DUI Drugs

**SB 1295**

Expands the DUI/OUI affirmative prescription drug defense to include prescription drugs prescribed by **any** licensed medical practitioner who is authorized to prescribe the drug.

**\*\*Effective date 8/6/2016**

*Amends A.R.S. §§ 28-1381(D); 5-395(C)*

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## PRESCRIPTION DRUG DEFENSE 28-1381(D)

- ⊙ Only potential defense to (A)(3) charge
- ⊙ Not a defense to (A)(1)
  - ARS 28-1381(B)
  - Irrelevant - preclude arguments
- ⊙ Must be valid on DOV
- ⊙ Must be U.S. doctor
- ⊙ Hearsay Issues
  - Prescription, as prescribed, type of doctor (for now)

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## PRESCRIPTIONS

- ⊙ 28-1381(D) is an affirmative defense.
  - Must be alleged 20 days before trial
  - Defendant's burden to raise/disclose
    - preponderance
    - file discovery request
    - right to jury instruction
  - Not an element
  - Question of fact

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## CASE ON POINT

### ◉ *Fannin* -

- 28-1381(D) is an affirmative defense
- Defendant's burden
- Use this & statute to get jury instruction

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## PRESCRIPTIONS

### ◉ 28-1381(D)

- Must take prescription as prescribed
- Therapeutic level DOES NOT equate to "as prescribed."
- Therapeutic level DOES NOT mean person is not impaired

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## DUI DRUG REMINDERS TO ASSIST WITH AFFIRMATIVE DEFENSE

- ◉ Look for evidence defendant is abusing his/her prescription
  - Admissions of when took and how much
  - Warnings & labels
  - Are pills in possession - time of day
  - Hiding pills
  - Denying taking
  - Document label information
  - Count pills - number left
  - Do they have other's pill bottle
  - Multiple prescriptions/doctors

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## PRESCRIPTIONS

- PDR/Web MD (your best friend)
  - Warnings
  - Side-effects
  - <http://www.pdr.net>
- Emphasize impairment and tox results
  - Tie together
- Additive effects (if more than one or ETOH combo)

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## WHY TAKE PRESCRIPTIONS?

Even if "as prescribed"

TO ALLEVIATE PAIN  
TO CHANGE ATTITUDE  
TO EFFECT MOOD

Person is under its influence  
Emphasize impairment

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## Ignition Interlock - DUI Drugs

**SB 1228**

- Ignition interlock order now discretionary for persons convicted of DUIs not involving alcohol.
- Violations of 28-1381(A)(3) will no longer result in a mandatory one year drivers license revocation.

\*\*Effective date 8/8/2016

Amends A.R.S. § 28-1381(A)(1) and (A)(3)

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## Fingerprint Clearance Cards - DUI

**HB 2514**

Those convicted of DUI must have a notation on their fingerprint clearance cards stating they are prohibited from driving a vehicle transporting others as part of their employment for 5 years following the DUI conviction.

*\*\*Effective date 9/8/2016*

*A.R.S. § 41-1758.03*

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## Finger Print Clearance Cards Restricted Vehicle Use - DUI

**HB 2514**

- Exempts real estate agents, cemetery brokers & salespersons, and camping brokers & salespersons unless they are also employed by an agency.
- Agency defined in 41-1758 – includes: department of child safety, department of juvenile corrections, DOT, the state real estate department, etc.

*\*\*Effective date 9/8/2016*

*A.R.S. § 41-1758.03*

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## Traffic Legislation

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## Stop & Tail Lamps

**HB 2509**

- Each tail, stop & signal lamp on a motor vehicle must meet statutory requirements.
- May not issue a citation for the first violation for driving a vehicle on the highway without a **stop lamp** (and every stop lamp meeting statutory requirements). Officer may issue a verbal or written warning or notice to repair.

\*\*Effective date 8/6/2016

Amends A.R.S. § 28-927 & 28-939

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### **HB 2905 RESPONDED TO FIKES & BECERRA**

- ◉Held: due to way statutes are written, cannot stop a vehicle for a tail/brake light violation if any tail/brake light is working
- ◉Becerra allowed stop for safety concerns
- ◉Fikes & Becerra control until 8/6/16.

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### **REMINDERS**

#### **FIRST INQUIRY - DOES 4<sup>TH</sup> AMENDMENT APPLY?**

- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State Action?

If not - 4<sup>th</sup> Amendment does not apply

If yes -is there a warrant exception, was it reasonable, ?

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### STOP OF VEHICLE REMINDERS

- Bring Out Safety Concerns in Testimony
  - Most equipment violations pose safety concerns
- Always Include Suspected Impaired Driving if Applicable
  - Most moving violations could be signs & symptoms of impairment
- They can stop for first stop lamp violation
  - Just cannot cite

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### 4TH AMENDMENT REMINDERS

- Good Faith
- Mistake of fact & law
- Exclusionary Rule (suppression) is NOT automatic
  - *Herring v. US*, 555 U.S. 35 (2009).
  - If relying on overturned precedent - *Davis v. US*, 564 U.S. \_\_\_\_ (2011)
- Inevitable discovery. *State v. Rogers*, 216 Ariz. 555 (App. 2007)
- Look for no stop/seizure - *Robles*
- AZ no tougher than feds except for home searches

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## Photo Radar

**SB 1241**

- Prohibits State & local authorities from using photo radar on state highways to identify persons who commit violations of Chapter 3 articles 3 and 6.
- Includes speeding & obedience to traffic control signals & signs.

\*\*Effective date 8/8/2016 Establishes A.R.S. § 28-1206

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## Photo Radar - Service

HB 2591

- Prohibits alternate service of photo radar citations.
- Prohibits suspension or revocation of driving privileges for a photo radar citation served by an alternative service of process.

\*\*Effective date 8/6/2016 Establishes A.R.S. § 28-1602

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## Autocycles

HB 2248

- Modifies definition of *autocycle*:  
 "a three-wheeled motorcycle on which the driver and passengers ride in a completely fully or partially enclosed seating area that is equipped with a roll cage, safety belts for each occupant and antilock brakes and that is designed to be controlled with a steering wheel and pedals."
- Establishes a Class D license is valid for operating an autocycle.

\*\*Effective date 8/6/2016 Amends A.R.S. § 101(5); 28-3101(A)(4)(a)

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## Miscellaneous Legislation

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## 2016 Supreme Court Justices: Number

**HB 2537**

Increases the number of Arizona Supreme Court Justices from five to seven.

**\*\*Effective date 8/6/2016**

*Amends A.R.S. § 12-101*

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## 2016 Victim Restitution

**HB 2376**

- Clarifies Victim Rights belong to the victim
- Grants a victim or victim's counsel the right at any restitution proceeding to:
  - present information or evidence
  - make an argument to the court
- Applies to juvenile & adult proceedings

**\*\*Effective date 8/6/2016**

*Amends A.R.S. §§ 8-416; 13-4437*

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## 2016 Disclosure: Victim & Witness Information

**HB 2376**

Prohibits disclosure of witness's personal identifying information contained in records created or received by law enforcement or prosecution if related to a criminal investigation or prosecution unless:

- witness consents in writing
- court orders disclosure; or
- witness's address is location of the crime

Excludes records transmitted between law enforcement, prosecution & court and laws governing discovery or trial conduct

**\*\*Effective date 8/6/2016**

*Amends A.R.S. §§ 39-121.04; 39-123.01;*

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## Disclosure: Victim & Witness Information (cont.)

### HB 2376

- Requires special action petition for release of records to establish the disclosure of records containing the visual depiction of a minor witness or victim outweighs victim/witness's right to privacy.
- Grants victim whose image is at issue, the right to be present and heard.

**\*\*Effective date 8/6/2016** Amends A.R.S. §§ 39-121.04; 39-123.01;

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## Victim Rights- Facility Dog

### HB 2375

- Requires the court to allow a victim under 18 to have a facility dog, if available, accompany the victim while testifying in court.
- Permits the court to allow a victim 18 or older to use a facility dog.

**\*\*Effective date 8/6/2016**

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## Failure to Appear

### HB 2154

- Consolidates A.R.S. §§13-3904 (violation of promise to appear) & 13-2506 (failure to appear in the second degree) under 13-2506.
- No substantive changes to either offense.
- Designates which law enforcement agency is responsible for 10-print fingerprints

**\*\*Effective date 8/6/2016** Amends A.R.S. §§ 13-2506; 13-3903; 13-3904

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## Trial Location In Transit Offenses

**SB 1214**

If an offense is committed "in transit" & it cannot be readily determined which county it was committed in, trial may be held in any county through or over which the transit occurred.

\*\*Effective date 8/6/2016  
Amends A.R.S. § 13-109

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### FOURTH AMENDMENT OPINIONS

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**A.R.S. § 28-925(C) - STOPS**

- ⦿ Visible white light from the license plate light is not a violation of A.R.S. § 28-925(C) [white light to the rear].
- ⦿ § 28-931(C)(2) provides an exception for license plate lights - so officer lacked grounds for the stop.
- ⦿ State could not rely on mistake of law.
- ⦿ Distinguished unilluminated license plates & safety concerns.

*State v. Stoll*, 2016 WL 2992890 (App. 2016).

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**MEDICAL MARIJUANA - SEARCH**

- ⦿ Scent of marijuana alone is insufficient to supply probable cause for search warrant of commercial warehouse.
- ⦿ Need circumstantial or direct evidence of unlawful possession

*State v. Sisco*, 238 Ariz. 229 (App. 7/20/15).

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**MEDICAL MARIJUANA - SEARCH**

Odor of burnt marijuana provided grounds for warrantless search of a car.

*State v. Cheatham*, 237 Ariz. 502 (App. 2015).

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**USE OF DRUG DOG IN HOTEL HALL**

- ⊙ Search with drug dog was reasonable
  - Hotel hallway is not a private area
  - Hotel staff allowed the officers to enter
- ⊙ Entry into room & removal of occupant until warrant obtained was reasonable
  - Officer legally in hallway
  - Reasonable to knock on door - dog alerted & recent traffic stop where dog alerted
  - Immediately smelled fresh marijuana
  - Risk of destruction of evidence provided exigency
- ⊙ NOTE: Medical marijuana not at issue

*State v. Foncelette, 719 Ariz. Adv. Rep. 18 (App. 2015)*

**SEARCH INCIDENT TO ARREST  
CELL PHONE**

- ⊙ Police may not search a cell phone incident to arrest where cell phone is in same room but not within arrestee's reach at time of search
  - Neither officer safety nor potential destruction of evidence theories apply to digital evidence
  - Privacy interests attach to cell phones
- ⊙ Search of cell phone not allowed to verify arrestee's identity
- ⊙ Warrant obtained after search did not allow admission of photos found on phone

*State v. Ontiveros-Loya, 237 Ariz. 472 (App. 2015).*

**A.R.S. 28-925(C) - STOPS**

- ⊙ A.R.S. § 28-925(C) [white light to the rear] does not apply to the white light from the license plate light.
- ⊙ § 28-931(C)(2) provides an exception - officer lacked grounds to stop the vehicle
- ⊙ State could not rely on mistake of law
- ⊙ Distinguished unilluminated license plates (cites to *Kjolsrud*) & safety concerns

*State v. Stoll, 2016 WL 2992890 (App. 2016)*

### GOOD FAITH - DOG SEARCH

- ◉ Good faith exception does not extend to the prolonged detention in traffic stop cases (occurring before *Rodriguez*) to wait for a drug dog
- ◉ *Rodriguez* did not announce new law in Arizona.
- ◉ NOTE: *State v. Wallace*, 2 CA-CR 2015-0299, 2016 WL 1728902 (April 29, 2016) (unpublished) distinguishes *Kjolsrud* when officer did not intentionally delay for dog.

*State v. Kjolsrud*, 2016 WL 1085229 (App. 2016).

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### GOOD FAITH - DOG SEARCH

- ◉ Could not extend repair order for dog
- ◉ Good faith exception does extend to the prolonged detention in traffic stop cases (occurring before *Rodriguez*) to wait for a drug dog
- ◉ Officer could rely in good faith on *State v. Box*, 205 Ariz. 492, ¶¶ 16-24 (App. 2003). [detention that briefly extended beyond what was needed for the traffic stop, to conduct a dog sniff, was minimally intrusive and did not violate the constitution.]

*State v. Driscoll*, 238 Ariz. 432(App. 2016)(rev. denied 4/11/2016).

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### SEARCH INCIDENT TO ARREST CELL PHONE

- ◉ Police may not search a cell phone incident to arrest where cell phone is in same room but not within arrestee's reach at time of search.
  - Neither officer safety nor potential destruction of evidence theories apply to digital evidence.
  - Privacy interests attach to cell phones.
- ◉ Search of cell phone not allowed to verify arrestee's identity.
- ◉ Warrant obtained after search did not allow admission of photos found on phone.

*State v. Ontiveros-Loya*, 237 Ariz. 472 (App. 2015).

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### **FAILURE TO SIGNAL - A.R.S. 28-754**

- May stop for suspected violation of 28-754 even when officer is the only "other traffic" that may be affected by the movement.
- Failure to signal does not have to cause an actual change in the movement of the other vehicle.
- It is enough if it might influence the driver's considerations in driving.

*State v. Salcido*, 238 Ariz. 461 (App. 2015).

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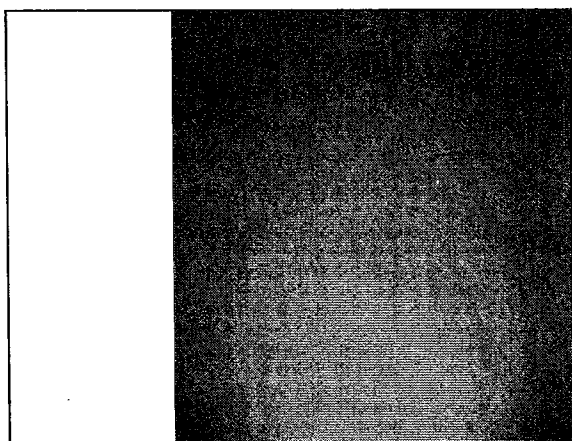
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### **ADMONITIONS**

- *State v. Valenzuela*
  - The old MVD admonitions are coercive & render the tests involuntary
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- MVD originally changed form Jan. 1
  - Another form issued May 19, 2016
  - Department should have the new MVD form
  - MVD won't accept another form
  - That is not a legal basis for suppression if officer uses different form

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## ADMONITIONS

- ◉ Opinion should not affect cases prior to opinion - *if make good faith argument*
- ◉ NOTE: the court adopted a totality of the circumstances test
  - ◉ Uses some good language for the State (indicates possible to avoid suppression even if officer tells suspect he/she is required to take the test.)
- ◉ Defense is filing motions to suppress

*State v. Valenzuela*, 2016 WL 1637656 (2016)

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**ADMIN PER SE/IMPLIED CONSENT**

Implied Consent Statute (A.R.S. § 28-1321) Held Constitutional.

*State v. Okken*, 238 Ariz. 566 (App. 2015).

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### COCAINE METABOLITE (BENZOYLECGONINE)

- ◉ May be able to prevail in (A)(3) & (A)(1) DUI cases even when only substance in blood test results is benzoylecgonine a non-impairing metabolite
- ◉ Testimony established
  - Its presence indicated recent use of cocaine
  - Defendant exhibited the effects of cocaine at time of the stop
  - 2 hours between crash and blood draw
  - So reasonable jurors could conclude Defendant had cocaine in his system when driving

*State v. McFadden*, No. 1 CA-CR 14-0614 (App. June 1, 2016)

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### COCAINE METABOLITE CASES (BENZOYLECGONINE)

- ◉ Work with officers & Crime Lab to establish *McFadden* Evidence:
  - Benzoylecgonine's presence indicates recent use of cocaine; symptoms of cocaine impairment exhibited by defendant; time between driving & blood draw, etc.
- ◉ Also May Want to Establish:
  - Time between any admission of use & blood draw
  - Time between blood draw and testing by the lab & fact that it continues to metabolize while in the blood tube
  - Any evidence of parent drug below the cut-off level
- ◉ *Chacon* May be Helpful

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### CHACON - DENIAL OF DAUBERT HEARING

- ◉ Not error to deny *Daubert* hearing on admissibility of THC under lab's cutoff levels (1.5 NG)
  - Issue raised by defense was methodology used - not testing process of the criminalist.
  - Same methodology used for carboxy results which Defendant did not challenge
  - Criminalist testimony re: amounts of THC goes to weight, not admissibility

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### CHACON - SUFFICIENCY OF EVIDENCE

- ⦿ Cannot be convicted of (A)(3) with carboxy or BE because they are non-impairing metabolites (not new - so defendant can't use, but judge will see it. Decide if this case helps. . . .)
- ⦿ Can be convicted of (A)(3) for active THC even though amount is below lab's cut-off level (new).

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### CITING TO MEMORANDUM DECISIONS

Supreme Ct. Rule 111(C)

- ✓ Cite only for its persuasive value
- ✓ Issued after 1/1/15
- ✓ Indicate in citation that it's a memo decision
- ✓ Provide a copy or free hyperlink
- ✓ Hasn't been depublished
- ✓ Previous opinion does not adequately address the issue cited for
- ✓ No duty to cite to memorandum decisions

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### STATE V. JENSEN, 1 CA-CR 14-0690

- ⦿ State doesn't have to prove solution used to calibrate Intoxilyzer 8000 is NIST traceable
- ⦿ It was not impermissible profile evidence when officer testified it is common for DUI suspects to minimize their drinking at the scene of a DUI stop
- ⦿ Defendant is not entitled to a *Willits* jury instruction for officer's failure to video record the FSTs.

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**FORCED MEDICAL BLOOD DRAWS**

- ◉ Although defendant was extremely hostile and combative with hospital personnel, he did not “expressly refuse” medical treatment
- ◉ Trial court properly denied motion to suppress

*State v. Nissley*, 238 Ariz. 446 (App. 2015)

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**FORCED MEDICAL BLOOD DRAWS**

- ◉ *Nissley* suggests a State Action Argument when applying 28-1388(E)
- ◉ *Cocio* & *Lind* also have good language
- ◉ Contact Beth for Medical Blood Draw Arguments

*State v. Cocio*, 147 Ariz. 277 (1985); *Lind v. Superior Court*, 191 Ariz. 233 (App. 1998).

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**VOLUNTARINESS OF BLOOD DRAW  
REMINDER FROM LAST YEAR**

- Blood draw exception to warrant requirement [28-1388(E)] does not apply when person receives treatment against his/her will
- **NOTE:**
  - defendant repeatedly told deputy did not want transport for treatment
  - Deputy gave an ultimatum
  - Should be limited to State Action (*Estrada* also).
- ◉ **Officers**
  - If you force person to go to hospital/get medical treatment, must get warrant for blood

*State v. Spencer*, 235 Ariz. 496 (App. 2014).

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**GOOD FAITH [28-1388(E)]**

- ◉ Good Faith, pursuant to *US v. Davis*, applies to *McNeely* claims
- ◉ Here it was a medical blood draw

*State v. Reyes*, 238 Ariz. 575 (App. 2015).

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**DUI - RIGHT TO COUNSEL**

- Stop (5:15 AM); invoked (6:31 AM); given phone book & Phone; first test 6:52 AM to conduct first test; officer testified concerned with 2hr window
- ◉ No violation of right to counsel: when defendant invoked, officer allowed him to call an attorney & gave adequate time
- ◉ Could not know when def attorney would call back, gave tests about 25 & 14 minutes before two hour window
- ◉ Officer reasonably avoided test outside 2 hour window

*State v. Peraza*, 2 CA-CR 2015-0022

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**BREATH TEST RECORDS  
JURY INSTRUCTION**

Jury instruction based on 28-1323(A)(5) that:  
 "records of periodic maintenance are prima facie evidence that the breath test instrument was working properly"  
 is a correct statement of the law and was properly given.

*State v. Peraza*, 2 CA-CR 2015-0022

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## MARIJUANA DUIS

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## STATE V. DOBSON

- ◉ AMMA does not immunize medical marijuana cardholders from prosecution under § 28-1381(A)(3)
- ◉ AMMA provides cardholders affirmative defense if cardholder shows, by preponderance of evid. that marijuana or its metabolite was in concentration insufficient to cause impairment
- ◉ Defendant bears the burden of proof by a preponderance of evidence

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## RETROACTIVITY

- ◉ *State v. Harris* (Shilgevorkyan, RPI) did not overrule previous case law
- ◉ Does not entitle defendant to Rule 32.1(g) relief
- ◉ Rational should apply to *Dobson* as well

*State v. Werderman*, 237 Ariz. 342 (App. 2015).

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## FAILURE TO OBEY

- A.R.S. 28-622(A) [willfully refusing or failing to comply with a lawful order or direction of a police officer] is not unconstitutionally vague.
- When appeal starts in municipal court, appeal is limited to facial validity of the statute
- Because limited to facial validity defendant had standing even though own conduct clearly covered by statute

*State v. Burke*, 238 Ariz. 322 (2016)

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*Thank You!*

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